INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	5
Conclusion	10
Appendix A	11
Appendix B	23

CITATIONS

Cases:

Bradford Electric Co. v. *Clapper*, 286 U.S. 145	8
Brown v. *American-Hawaiian S.S. Co.*, 211 F. 2d 16	7
General Electric Co. v. *Cuban American Nickel Co.*, 396 F. 2d 89	7
Maddux v. *Cox*, 382 F. 2d 119	7
Murray v. *United States*, 405 F. 2d 1361	7
Ocean Drilling and Exp. Co. v. *Berry Bros. Oil Field Service*, 377 F. 2d 511, certiorari denied, 389 U.S. 849	7
Travelers Insurance Co. and Branden Aermotor Corp. v. *United States*, Civil No. 69–859, E.D. Pa	9
United Air Lines v. *Wiener*, 335 F. 2d 379, certiorari dismissed, 379 U.S. 951	4–6

360-734—69——1

Cases—Continued Page

United States v. *Seckinger*, No. 395, October Term, 1969 9

Weyerhaeuser Steamship Co. v. *United States*, 372 U.S. 597 7–8

Wien Alaska Air Lines v. *United States*, 375 F. 2d 736, certiorari denied, 389 U.S. 940 6–7

Statutes:

Federal Employee's Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. 8101, *et seq* 2, 4–8

5 U.S.C. (Supp. IV) 8101, *et seq* 2, 4–8

28 U.S.C. 1254(1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

UNITED STATES OF AMERICA, PETITIONER

v.

WALLENIUS BREMEN, G.M.B.H., OWNER OF THE M/V MARTHA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on April 25, 1969.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 11–21) is reported at 409 F. 2d 994. The opinion of the district court (App. B, *infra,* pp. 23–26) is reported at 290 F. Supp. 195.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1969 (App. A, *infra,* p. 22). On July 18, 1969, the Chief Justice extended the time

for filing a petition for a writ of certiorari to and including Aug. 23, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a third person is barred from obtaining indemnity from the United States for a payment made to a federal employee for injuries suffered as a result of the alleged joint negligence of the third person and the United States where, because of the provision in the Federal Employees' Compensation Act that the remedy thereunder is exclusive, the injured employee could not have maintained a tort suit against the United States.

STATUTE INVOLVED

The Federal Employees' Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. (Supp. IV) 8101, *et seq.*, provides in pertinent part:

> § 8116(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

STATEMENT

Alan L. Mitchell, an inspector for the Plant Quarantine Division of the United States Department of Agriculture, fell from a ladder on the M/V *Martha*, a vessel owned by the respondent Wallenius, as he was leaving the vessel after inspecting its vegetable stores. Mitchell struck a wooden fender between the vessel and the dock and was injured. Mitchell filed a libel against the *Martha* and Wallenius in the United States District Court for the Eastern District of Virginia, contending, *inter alia*, that Wallenius was negligent in rigging the ladder and in either failing to put a safety net under it or placing it in such a position that it wobbled dangerously. (App. A, *infra*, pp. 11–12; App. B, *infra*, p. 23; R. 1, 2, 120.)

Mitchell's suit against the *Martha* and Wallenius was settled by Wallenius for $110,000. Wallenius then brought the present suit against the United States for indemnity, alleging that Mitchell's fall had been caused by his own physical infirmities; that the United States knew or should have known that Mitchell was not physically capable of performing his assigned duties; and that by permitting Mitchell to board the vessel, the United States broke an alleged duty of "implied warranty" to Wallenius to use reasonable care in ensuring that the inspector was physically fit. (App. A, *infra*, p. 12; R. 2, 3.)[1]

The district court granted the government's motion for summary judgment. It held (1) that because

[1] The district court had jurisdiction over this suit under 46 U.S.C. 742.

Mitchell was covered by the Federal Employees' Compensation Act, he could not have maintained a tort action against the United States; (2) that "since the United States could not be held liable to its employee '* * * neither contribution nor indemnity can be awarded without the support of liability on the part of the indemnitor to the person injured' " (App. B, *infra,* p. 24). The latter ruling rested upon the court's acceptance of *United Air Lines* v. *Wiener,* 335 F. 2d 379 (C.A. 9), certiorari dismissed, 379 U.S. 951, which had denied an airline contribution from the United States where government employees had been killed in an air collision that resulted from the joint negligence of the United States and the airline.

The court of appeals, stating that it "disagree[d]" with *Wiener* and refusing to follow it, held that "the existence of the Federal Employees Compensation Act does not bar third-party claims for indemnity" (App. A, *infra,* p. 18). It ruled that noncontractual indemnity could be obtained "if the person from whom indemnity is sought (the government here) owed a *duty* of his own to the injured person," but that it was unnecessary that there also be "indemnitor's *liability* to the injured party" (App. A, *infra,* pp. 18–19, emphasis in original). The court remanded the case to the district court to "consider and determine whether the plaintiff may be entitled to recover under any theory advanced: tort indemnity, implied contract to indemnify, or independent tort" (App. A, *infra,* p. 21, footnotes omitted).

REASONS FOR GRANTING THE WRIT

1. As the court of appeals recognized, its holding that Wallenius was not barred from obtaining indemnity from the United States even though Mitchell could not himself have recovered in tort from the United States—his only remedy being under the Federal Employees' Compensation Act—conflicts with *United Air Lines* v. *Wiener,* 335 F. 2d 379 (C.A. 9), certiorari dismissed, 379 U.S. 951. In *Wiener* several government employees were killed in a mid-air collision which the court found resulted from the joint negligence of the United States and the airline. In rejecting the airline's claim against the United States for indemnity, despite its conclusion that the government's culpability in the accident was far greater than the airline's (335 F. 2d 402), the court accepted the government's contention that "by operation of the exclusive liability provision of this section [of the Federal Employees' Compensation Act] there is no underlying tort liability of the government to its employees and therefore there is no basis for indemnification" (*ibid.*). The court stated (p. 404):

> United's claim for indemnity is not based upon a duty owed by the government to United by virtue of a contract, attenuated or otherwise, or by operation of a rule of law such as the divided damage rule of admiralty. There being no underlying liability on the part of the government, United's claim for indemnity must fall. * * *

In the present case, however, the court of appeals held that the absence of any tort liability of the United States to the injured federal employee does not bar Wallenius' claim for indemnity; it concluded that indemnity may be had as long as the United States has broken a duty it owes to the employee, without regard to whether the Federal Employees' Compensation Act bars a recovery for such breach. The Fourth Circuit did not attempt to distinguish *Wiener,* but flatly rejected it; after quoting extensively from the *Wiener* opinion, it stated (App. A, *infra,* p. 18): "We disagree. * * * [T]he existence of the Federal Employees Compensation Act does not bar third-party claims for indemnity."

Although *Wiener,* being a suit under the Federal Tort Claims Act, applied the governing state law of indemnity, and the present case involves maritime law, this would not be a tenable basis of distinction between the two cases. For in both cases the critical inquiry is whether indemnity is precluded in the case of injury to federal employees by the exclusivity provisions of the Federal Employees' Compensation Act. This is a federal question involving the effect of that provision upon an otherwise existing right to indemnity.

In short, the conflict between the Ninth Circuit in *Wiener*[2] and the court of appeals in the present case is clear and acknowledged, and ripe for resolution.

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[2] The Ninth Circuit followed its *Wiener* decision in *Wien Alaska Airlines* v. *United States,* 375 F. 2d 736, certiorari denied, 389 U.S. 940. It interpreted its *Wiener* decision as holding "in substance, that a claim for noncontractual tort

2. The court of appeals below erred in reading this Court's decision in *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 597, as requiring the conclusion it reached. In *Weyerhaeuser* the Court held that the exclusivity provision of the Federal Employees' Compensation Act did not bar a shipowner from requiring the United States to pay its share of the damages for injuries a government employee suffered in a collision between a government vessel and a pri-

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indemnity can be maintained only where there is tort liability on the part of the indemnitor to the person injured" (375 F. 2d 737). See, also, *Maddux* v. *Cox*, 382 F. 2d 119 (C.A. 8), where Cox, a serviceman on official duty, was injured in an automobile collision resulting from the joint negligence of the other serviceman (who was driving) and the driver of the other car. The court, citing *Wien* and *Wiener*, held that "[s]ince the United States has no liability in tort to Cox, it cannot be held liable in contribution for his injuries" (382 F. 2d 124). Compare *Murray* v. *United States*, 405 F. 2d 1361 (C.A.D.C.), which held that the exclusivity provision of the Federal Employees' Compensation Act barred a third person from obtaining contributions from the United States for injuries suffered by a government employee as a result of the alleged joint negligence of the United States and a third person.

Other courts of appeals have approved essentially the same principle the Ninth Circuit followed in *Wien* and *Wiener* in holding that where a seaman was injured by the joint negligence of two private parties, there would be no indemnity where the result would be to impose indirectly upon an employer a tort liability from which he would be directly immune because of the provision in the Longshoremen's and Harbor Workers' Act that the remedy thereunder, like that under the Federal Employees' Compensation Act, is exclusive. *Brown* v. *American-Hawaiian S.S. Co.*, 211 F. 2d 16, 18 (C.A. 3); *Ocean Drilling and Exp. Co.* v. *Berry Bros. Oil Field Service*, 377 F. 2d 511, 514–515 (C.A. 5), certiorari denied, 389 U.S. 849; cf. also, *General Electric Co.* v. *Cuban American Nickel Co.*, 396 F. 2d 89, 100–102 (C.A. 5).

vate one. That decision was squarely rested, however, upon the Court's conclusion that in the Federal Employees' Compensation Act Congress did not intend to disturb "a rule of admiralty law which, for more than 100 years, has governed with at least equal clarity the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault" (p. 603). Although the Court did state (p. 601) that "[t]here is no evidence whatever that Congress was concerned [in the exclusivity provision] with the rights of unrelated third parties"—a statement to which the court of appeals below attached considerable weight—this statement cannot fairly be applied to the different situation of this case. Unlike the case in *Weyerhaeuser,* to apply the exclusivity bar of the Compensation Act here to bar indemnity would in no way "disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases" (p. 601). To the contrary, to permit indemnity in the present situation, which involves an ordinary situation of alleged joint tort feasance, would seriously undermine the basic purpose of the Federal Employees' Compensation Act, which, like other compensation laws, is designed to provide not only for employees "a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate" (*Bradford Electric Co.* v. *Clapper,* 286 U.S. 145, 159).

3. The question whether a third person can recover indemnity from the United States for a liability for injuries suffered by a government employee through the joint negligence of such person and the United States is an important and recurring one in litigation between the government and third persons.[3] Although the decision below is interlocutory in the sense that the case has been remanded for further proceedings, it is a final determination of the legal issue here presented, which will control all future litigation in the Fourth Circuit and is likely to affect future litigation elsewhere.[4] There is a direct conflict on the question, the decision below undoubtedly will have an unsettling effect in an area where the law hitherto has been regarded as settled, and the issue is now ripe for resolution by this Court in this case.

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[3] Another facet of the problem of indemnity between the government and third persons in cases where injury results from their joint negligence is before the Court on the government's petition for certiorari in *United States* v. *Seckinger*, No. 395, this Term. The issue in that case is whether the government's own negligence precludes it from obtaining indemnity from a negligent contractor, under a standard form of indemnity contract that makes the contractor liable for damages resulting from his "fault or negligence."

[4] For example, in *Travelers Insurance Co. and Branden Aermotor Corp.* v. *United States*, Civil No. 69–859, E.D. Pa., in which a third person is seeking both noncontractual indemnity and contribution from the United States for damages paid to an injured federal employee where the United States allegedly was also negligent, the court has stayed further proceedings pending this Court's action on this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
ALAN S. ROSENTHAL,
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Attorneys.

AUGUST 1969.

APPENDIX A

United States Court of Appeals
For the Fourth Circuit

No. 12,353

WALLENIUS BREMEN G.M.B.H., OWNER OF THE M/V MARTHA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, *District Judge*

(Argued October 30, 1968; decided April 25, 1969)
Before CRAVEN and BUTZNER, *Circuit Judges*, and McMILLAN, *District Judge*

CRAVEN, *Circuit Judge*:

The single question presented on appeal is whether the exclusive remedy provision of the Federal Employees' Compensation Act bars the claim of a third party for indemnity against the federal government for damages paid an injured government employee. We think it does not and, accordingly, reverse the entry of summary judgment in favor of the United States.

After inspecting agricultural products aboard the M/V *Martha*, a ship owned by Wallenius Bremen,[1]

[1] We are advised by counsel that Wallenius Bremen G.m.b.H., is a German corporation.

United States Department of Agriculture inspector Mitchell fell off an accommodation ladder between the ship and the dock. He was severely injured when he struck a wooden fender. On January 7, 1966, the inspector filed a libel against Bremen and the *Martha*, seeking damages for his personal injuries allegedly resulting from Bremen's negligence. Bremen settled his suit for $110,000, and then brought suit against the United States, under the Federal Tort Claims Act[2] and the Suits in Admiralty Act,[3] seeking indemnity for the amount paid the inspector in settlement, plus attorney's fees and expenses. The theory of Bremen's suit, the merits of which, if any, we do not reach, was that the inspector's physical condition was such, and was known or should have been known by the United States to be such, that he could not perform his duties with safety to himself and others, and that his physical infirmities had caused or contributed to his fall. Such allegations, fleshed out in the complaint, presented a three-pronged theory of recovery. Conceivably Bremen might be entitled to recover on either (1) a strict tort indemnity theory, or because of (2) implied warranty or contract of indemnity said to arise from the conduct of the United States in requiring the ship to submit to agricultural inspection. It was also contended that Bremen was entitled to recover on (3) an independent tort theory based upon an alleged breach of a duty of care not to Inspector Mitchell but to the ship.

The motion of the United States for summary judgment was granted by the district court on the sole ground that suit by the inspector against the United States was barred by the Federal Employees' Compensation Act (5 U.S.C. §§ 751 et seq.) (now

[2] 28 U.S.C. §§ 1346(b), 2671 et. seq.
[3] 46 U.S.C. §§ 741, 742 et. seq.

§§ 8102(a), et seq. (1964)). The district judge reasoned that Bremen could not be awarded indemnity without supporting liability on the part of the indemnitor (the United States) to the person injured, and that there could be none because of the statute.

In pertinent part, the statute provides that "[t]he liability of the United States or any of its instrumentalities * * * with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death * * * ." § 757(b) (now § 8116(c)).

The listing of those excluded from other remedies is the employee, his legal representative, spouse, dependents, next of kin, and finally, the catch-all category "anyone otherwise entitled" which, we think, relates back to previous nouns. All are connected to and closely related to the government employee. The catch-all category simply expresses congressional caution, typical in the drafting of statutes, to exclude all deriving their claims from a personal relationship to the government employee. Ejusdem generis would, for example, perhaps exclude from any other remedy an adopted child, neither next of kin nor dependent, but would not exclude a stranger.

The reason for excluding those in a personal relationship to the government employee is that they presumably benefit from the creation of the exclusive statutory remedy, whereas third-party tort-feasors who are also victims of the government's tortious conduct do not. Thus, Bremen urges that when a third party's right of action against the United States arises out of an independent duty owed by the United States

to the third party, it is not barred, nor intended to be barred, by the foregoing statutory limitation, and that so to construe the statute is a distortion of congressional purpose.

Despite the exclusive remedy provision of statutes destroying tort liability of the government and substituting the statutory scheme, indemnity has been allowed in at least three situations by the United States Supreme Court. In 1956, the Supreme Court, while deciding a claim for indemnity in a case involving the Longshoremen's and Harbor Workers' Compensation Act, specified that "[W]e do not meet the question of a noncontractual right of indemnity or of the relation of the Compensation Act to such a right." *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Corp.,* 350 U.S. 124, 133 (1956). In *Ryan,* the employee of a stevedore sued a shipowner for injuries sustained in a cargo accident, and the shipowner filed a third-party complaint against the stevedore. Five members of the Supreme Court approved allowing the third-party complaint, rejecting the stevedore's contention that the Longshoremen's and Harbor Workers' Compensation Act, in limiting the stevedore's liability to the compensation provided for in the Act, barred the shipowner from recovering indemnity from the stevedore for damages for which the shipowner had been held liable as a result of the stevedore's breach of a contractual duty owed the shipowner. Such a *contractual* duty was found in the stevedore's agreement to stow cargo for the shipowner, and therefore to stow it properly.

More closely in point, because it interprets the statute in our case, is *Weyerhaeuser SS Co.* v. *United States,* 372 U.S. 597 (1963), involving a mutual fault collision between a ship and an Army dredge. A United States employee on the dredge sued the shipowner and collected. When the admiralty rule of divided

damages was applied, allowing each party to recover from the other one-half of its provable damages and court costs, the shipowner was allowed to include in his damages, and thus paritally to recover from the United States, the amount he had paid the United States employee for his injuries. The Court held that the Federal Employees' Compensation Act did not abrogate the historic admiralty rule of divided damages in mutual fault collisions. While the Court conceded that there was no contractual obligation, as in *Ryan,* it said that there was "instead, a rule of admiralty law which, for more than 100 years, has governed with at least equal clarity the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault." 372 U.S. at 603.

This statement of the Court in *Weyerhaeuser,* is, we think, of controlling importance and strongly supports Bremen's view of the Act:

> "The legislative history of the Federal Employees' Compensation Act, originally passed in 1916, shows that the concern of Congress was to provide federal employees a swift, economical, and assured right of compensation for injuries arising out of the employment relationship, regardless of the negligence of the employee or his fellow servants, or the lack of fault on the part of the United States. The purpose of § 7(b), added in 1949, was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. *There is no evidence whatever that Congress was concerned with the rights of unrelated third parties,* much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases." [Empasis added.] [Footnote omitted.]

Weyerhaeuser permits indemnity to the shipowner who had satisfied the claim of the injured United States employee, even though the injured employee could not himself have maintained a suit for damages against the United States because of the limitation of the Act. Thus it seems clear that the exclusive remedy provision of the Act is not per se a bar to an action for indemnity.

That the Court may have thought that other types of obligations, as well as the divided damages rule, were intended to be undisturbed by the Federal Employees' Compensation Act when claims based on them were pressed by third parties, is indicated by the disposition of *Treadwell Const. Co.* v. *United States,* 372 U.S. 772 (1963). The conclusion of the Court of Appeals for the Third Circuit, sub nom., *Drake* v. *Treadwell Const. Co.,* 299 F. 2d 789 (3rd Cir. 1962), was that the United States could not be made to contribute as a joint tort-feasor when prosecution of a tort action by the injured person against the United States was barred by § 7(b) of the Compensation Act. This decision was vacated and the case was remanded to the district court to consider in the light of Weyerhaeuser the validity of a claim by a government contractor for indemnity, after the contractor paid damages to a government employee who was injured by the explosion of a tank provided by the contractor.

But the government urges that *Ryan, Weyerhaeuser* and *Treadwell* are distinguishable, and therefore not controlling, and press upon us the view of the Ninth Circuit denying indemnity in *Wien Alaska Airlines, Inc.* v. *United States,* 375 F. 2d 736 (9th Cir. 1967), and in *United Air Lines* v. *Wiener,* 335 F. 2d 379 (9th Cir. 1964), *cert. denied* 379 U.S. 951 (1964). The *Wiener* case concerned a mid-air collision between a United States plane and a private plane, in

which private persons and government employees were killed. The court held that United Air Lines could not claim indemnity for wrongful death damages paid to the survivors of the government employees, though indemnity was awarded for damages paid the other passengers:

> "[The United States] argues that by operation of the exclusive liability provision of this section there is no underlying tort liability of the government to its employees and therefore there is no basis for indemnification. In our view United's claim for indemnity * * * is barred in accordance with the government's * * * contention.
>
> "The Supreme Court in Weyerhaeuser * * *, held that the express provisions of the statute do not qualify the historic admiralty rule of divided damages in mutual fault collisions. The admiralty rule of divided damages is to be distinguished from the rule of indemnity urged upon us by United since under admiralty law there arises from a collision involving mutual fault the right to apportionment of all damages resulting therefrom, including personal injuries, cargo damage, and damage to the ships. The divided damage rule is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured. On the other hand neither contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor to the person injured. *The courts have consistently held that in the absence of an express or implied contract of indemnity, or in the absence of the indemnitor's liability to the injured party, there can be no recovery for indemnity.* [Citations.]" 335 F. 2d at 402–03. [Emphasis added.] The court concluded that

bar of the statute, the district judge failed to consider the other issues tendered by the government in the final pretrial order.[5] We remand the case to consider these and other issues that arise on the pleadings in their present form or as may be amended.

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[5] These were stated as fact contentions of defendant:

"(1) Mitchell suffered no physical impairment which caused him to fall from the gangway.

"(2) Mitchell has been performing his duties capably for over five months preceding the accident.

"(3) For over five months preceding the accident, Mitchell conducted himself in a normal fashion, showing no signs of any physical impairment whatsover.

"(4) For over five months preceding the accident, Mitchell's supervisors observed no sign of any physical impairment in Mitchell.

"(5) At no time did any physician treating Mitchell advise Mitchell's supervisors that Mitchell was unfit for his job or that Mitchell's employment endangered his health.

"(6) It was reasonable for Mitchell's supervisors to have allowed Mitchell to board plaintiff's vessel on January 10, 1965.

"(7) No act of the Government caused plaintiff any injury.

"(8) It was unforeseeable that Mitchell's presence on the M/V *Martha* would injure plaintiff.

"(9) Plaintiff's failure to notify the Government of its indemnity claim or of its intended settlement with Mitchell greatly prejudiced the Government and was unreasonable.

"(10) Plaintiff's failure to give the Government an opportunity to participate in the defense of Mitchell's suit was unreasonable and greatly prejudiced the Government.

"(11) The amount paid to Mitchell in settlement was excessive.

"(12) The attorney's fees allegedly paid by plaintiff for defense of Mitchell's suit were excessive.

"(13) Plaintiff had the last opportunity to avoid the accident."

On remand the district court should consider and determine whether the plaintiff may be entitled to recover under any theory advanced:[6] tort indemnity, implied contract to indemnify, or independent tort.[7]

Nothing we have said is intended either to encourage or to prevent renewed summary procedures, *compare Schwartz* v. *Compagnie General Transatlantique* (No. 32648, 2d Cir., Dec. 11, 1968), nor do we mean to express any opinion as to the ultimate merit, if any, of plaintiff's claim.

Reversed.

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[6] Although the complaint is framed in terms of indemnity it may, of course, without amendment, be read to embrace contribution. The district court so read it on a prior motion to dismiss, noting that the Federal Tort Claims Act comprehends claims by way of contribution or indemnity, citing *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951); *Uptagrafft* v. *United States*, 315 F.2d 200 (4th Cir. 1963); *Drumgoole* v. *Virginia Electric & Power Co.*, 170 F. Supp. 824 (E.D.Va. 1959).

[7] In a fact situation the converse of ours, the Supreme Court has recently recognized the possibility that a stevedore whose employee was killed in a shipboard accident has a direct action in tort against the shipowner to recover the amount of compensation payments made by the stevedore. *Federal Maritime Terminals, Inc.* v. *Burnside Shipping Co., Ltd.*, 37 *U.S.L.W.* 4271 (April 1, 1969), held that § 33 of the Longshoremen's and Harbor Workers' Compensation Act was not the exclusive source of the stevedore's remedies against the shipowner. The Court remanded to the district court to allow the plaintiff to pursue various theories of recovery—including independent tort.

[Judgment]

United States Court of Appeals for the Fourth Circuit

No. 12353

WALLENIUS BREMEN G.M.B.H., OWNER OF THE M/V MARTHA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; that this case is remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, with instructions to consider and determine whether the plaintiff may be entitled to recover under any theory advanced: tort indemnity, implied contract to indemnify, or independent tort.

SAMUEL W. PHILLIPS,
Clerk.

A True Copy, Teste:

[SEAL] SAMUEL W. PHILLIPS, *Clerk,*
By MARGARET M. WALTON,
Deputy Clerk.

APPENDIX B

In the United States District Court for the Eastern District of Virginia

Norfolk Division

Civil Action No. 6225

WALLENIUS BREMEN G.M.B.H., OWNER OF THE M/V MARTHA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

MEMORANDUM

Alan Mitchell, an employee of the United States Government, was acting as an inspector for the Department of Agriculture when he was injured on June 10, 1965, falling from the gangway while leaving the M/V *Martha,* after an inspection.

Mitchell sued the M/V *Martha* and the owners on the theory of an obstruction of the gangway and the failure of the vessel to have safety nets rigged. They settled their liability for $110,000.00 in a final decree, entered on October 12, 1966, Admiralty No. 8626, *Alan L. Mitchell* v. *M/V Martha,* etc., United States District Court for the Eastern District of Virginia, Norfolk Division.

On June 7, 1967, the present suit was instituted by Wallenius Bremen G.m.b.H., owner of the M/V *Martha,* against the United States for indemnity (§ 9 of the Complaint filed June 7, 1967).

To the complaint, the United States filed its Motion for Summary Judgment under Rule 56, Federal Rules of Civil Procedure, claiming that the plaintiff would be unable to prove any facts at trial upon which relief could be granted.

The parties agree that Mitchell is limited in his recovery against the United States to the provisions of the Federal Employees Compensation, 5 USC 751, et seq. [§ 757(b)].

Mitchell could not maintain a suit against the United States, this matter falls directly under the lengthy, well reasoned opinion in *United Air Lines, Inc.* v. *Wiener,* 335 F. 2d 379 (9th Cir. 1965), Cert. Den. 379 U.S. 1951 (1964), that since the United States could not be held liable to its employee "* * * neither contribution nor indemnity can be awarded without the support of liability on the part of the indemnitor to the person injured". In that case, the United States was found to be the primary wrongdoer in an air accident between a United Air Lines passenger plane and a U.S. Air Force trainer plane. Indemnity against the United States was granted as to judgments paid to United passengers who were not Government employees, but indemnity was denied as to United passengers who were Government employees, on the grounds, as stated above, that indemnity could not be awarded where there was no liability on the United States (indemnitor) to employees of the United States because of Federal Employees Liability Act [5 USC, § 757(b)].

The plaintiff argues that some questions have arisen as to whether the United States Supreme Court has indicated a softening of this position under the two cases of *Weyerhauser S.S. Co.* v. *United States,* 372

U.S. 597 (1963) and *Drake* v. *Treadwell Construction Co.*, 299 F. 2d 789 (3rd Cir. 1962).

Both of these cases are discussed in the opinion in *United Air Lines, Inc.* v. *Wiener*, supra, beginning at page 402. There the Court pointed out, as to *Weyerhaeuser*.

> * * * The admiralty rule of divided damages urged upon us by United since under admiralty law there arises from a collision involving mutual fault the right to apportionment of all damages resulting therefrom * * *. The divided damage rule is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured. On the other hand neither contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor to the person injured. The Courts have consistently held that in the absence of an express or implied contract of indemnity or in the absence of the indemnitor's liability to the injured party, there can be no recovery for indemnity. [Citing many cases.]

We further agree with the opinion in *United Air Lines* v. *Wiener*, supra, at page 404, that the remand of *Treadwell Construction Co.* v. *United States*,[1] (*Drake* v. *Treadwell*, etc., supra), did not amount to a rejection of the well settled proposition that there being no underlying liability on the part of the United States, the indemnitee had no claim against the United States as indemnitor.

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[1] On remand to United States District Court for the Western District of Pennsylvania, this case was settled before an appeal was perfected under a stipulation dated September 13, 1963, which specified that it did not constitute an admission of liability on the part of the United States.

The same position here urged by the plaintiff—i.e., that *Weyerhaeuser* and *Treadwell,* represent a change in the well established principles which would exclude the Government as indemnitor—were thus rejected in *United Air Lines* v. *Wiener,* supra.

The same position here urged by the plaintiff, rejected in *United Air Lines* v. *Wiener,* was urged again to the United States Court of Appeals for the Ninth Circuit in *Wien Alaska Airlines, Inc.* v. *United States,* 375 F. 2d 736, (9th Cir. 1967), and was rejected again on a motion for summary judgment.

The same position here urged by the plaintiff, now twice rejected, was pressed a third time in *Wien Alaska Airlines, Inc.* v. *United States,* in a petition for certiorari to the United States Supreme Court in the October Term, 1967, and was rejected a third time when certiorari was denied, 383 U.S. 940 (November 6, 1967).

The claim for noncontractual tort indemnity against the United States cannot be maintained where there is no tort liability on the part of the United States to the person injured.

The motion for summary judgment will be affirmed upon presentation of a proper order in accord with this memorandum.

[Sgd.] JOHN A. MACKENZIE,
United States District Judge.

NORFOLK, VIRGINIA, *February 13, 1968.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 498

UNITED STATES OF AMERICA,

Petitioner,

v.

WALLENIUS BREMEN, G.M.B.H., OWNER OF THE M/V MARTHA,

Respondent.

BRIEF IN OPPOSITION

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INDEX

	Page
Question Presented	1
Reasons for Denying the Petition	1
Conclusion	4

CITATIONS

Treadwell Construction Co. v. *United States*, 372 U.S. 772 (1963)	2
Weyerhaeuser S. S. Co. v. *United States*, 372 U.S. 597 (1963)	1, 2

TREATISE

Larson, *Workmen's Compensation Law*	3

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Respondent.

BRIEF IN OPPOSITION

QUESTION PRESENTED

Does the exclusive remedy provision of the Federal Employees Compensation Act bar a claim of a third party for indemnity against the Federal Government for damages arising out of an injury to an employee of the Federal Government.

REASONS FOR DENYING THE PETITION

The decision of the Court of Appeals is correct and conforms with the decisions of this Court in *Weyerhaeuser S.S. Co.* v. *United States,* 372 U. S. 597 (1963),

and *Treadwell Construction Co.*, v. *United States*, 372 U. S. 772 (1963), vacating and remanding *Drake* v. *Treadwell Construction Co.*, 299 F.2d 789 (3rd Cir. 1962). In *Weyerhaeuser* this Court found that the provision of the Federal Employees' Compensation Act was not intended to affect the rights of third parties in suits against the Government, and it held that the rule of divided damages in a maritime collision was unaffected by this legislation. In *Treadwell Construction Co.* v. *United States* this Court considered an action for indemnity and contribution by a third party against the United States which did not involve the admiralty rule of divided damages, and it granted a petition for a writ of certiorari, vacated the judgment of the Third Circuit Court of Appeals and remanded the case to the district court for further consideration in light of its decision in *Weyerhaeuser*.

The decision in *Weyerhaeuser* is not distinguishable from the facts in this case simply because *Weyerhaeuser* involved the admiralty rule of divided damages. The controlling conclusion in *Weyerhaeuser* is its finding that Congress did not intend the exclusive remedy provision of the Federal Employees' Compensation Act to bar actions by third parties against the Government. The Federal Employees' Compensation Act withdraws any other remedy a Government employee might have against the Government; however, the same act provides a remedy for the employee and is thus a substitute for that which is withdrawn. On the other hand the Federal Employees' Compensation Act provides no remedy for a third party where there is not any personal relationship with the employee; thus, this act should not be construed as withdrawing any third party's remedy where no comparable benefit has been bestowed. The distinction should, therefore, rest solely on whether

a cause of action has been replaced by a comparable benefit under the Federal Employees' Compensation Act.

Of course, a cause of action must rest on its own merits, and with this in mind the Court of Appeals has remanded this matter to the District Court for consideration of other issues which arose on the pleadings either by summary procedures or by trial. Consequently, the decision of the Court of Appeals is not final and may very well be disposed of in favor of the petitioner. To grant a writ of certiorari at this point may require the parties to bear needless expense and be exposed to unnecessary delay.

Furthermore, the Court may be faced with the necessity of disposing of this matter without reaching the conflict which apparently exists between the Fourth and Ninth circuits. In addition to holding that the exclusive remedy provision of the Federal Employees Compensation Act is not a bar to a third party action against the Federal Government, the Fourth circuit in this case held that the exclusive remedy provision was not a bar to the right of action which is based on an independent duty running between the United States and a third-party. Even in jurisdictions which treat similar exclusive remedy provisions in other workmen's compensation statutes as barring third party actions, it has been held that where a third party's cause of action is based on a duty running between it and the employer the exclusive remedy provision is not a bar. Larson, *Workmen's Compensation Law* §76.30 *et seq.* Therefore, if a writ of certiorari is granted the Court will be presented with a matter which is not final and which may not present an opportunity to resolve the conflict of which the petitioner complains.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,
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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 498

UNITED STATES OF AMERICA, PETITIONER

v.

WALLENIUS BREMEN, G.m.b.H., OWNER OF THE M/V MARTHA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

The United States submits this supplemental memorandum to invite the Court's attention to a recent decision of the Court of Appeals for the First Circuit in *Newport Air Park, Inc.* v. *United States*, C.A. 1, No. 7317, decided December 4, 1969. A copy of that opinion is appended to this memorandum. In holding that the effect of the Federal Employees Compensation Act is to bar contribution from the United

States, the *Newport Air Park* decision conflicts with the ruling of the Fourth Circuit in the instant case, that the FECA did not preclude Wallenius Bremen from recovering contribution or indemnity from the United States. Moreover, the First Circuit construed the opinion of this Court in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, in a manner contrary to the Fourth Circuit in this case. The decision in *Newport Air Park* further emphasizes the recurrent nature of this issue, and the appropriateness of plenary review by this Court.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1970.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7317

NEWPORT AIR PARK, INC., PLAINTIFF, APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT, APPELLANT

Appeal from the United States District Court
for the District of Rhode Island

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Alan S. Rosenthal, Attorney, Department of Justice, with whom *William D. Ruckelshaus*, Assistant Attorney General, *Edward P. Gallogly*, United States Attorney, and *Daniel Joseph*, Attorney, Department of Justice, were on brief, for appellant.

Marsha E. Swiss, with whom *Bruce G. Sundlun* and *Amram, Hahn & Sundlun* were on brief, for appellee.

December 4, 1969.

ALDRICH, *Chief Judge*. Due to the negligence of appellant United States and appellee Newport Air Park, Inc., two airplanes collided at the Warwick, Rhode Island airport. Appellee settled the ensuing

injury claims, and appellant, pursuant to a local statute requiring contribution,[1] reimbursed appellee to the extent of one-half of its outlay. This it did because the waiver contained in the Federal Tort Claims Act, FTCA, extends to claims for contribution when the government is a joint tortfeasor. *United States* v. *Yellow Cab Co.*, 1951, 340 U.S. 543.[2] The government made one exception, which has resulted in the present lawsuit. One of the persons killed by the collision was a government employee. The government's obligation to its employees is under the Federal Employees' Compensation Act, FECA, 5 U.S.C. §§ 8101, et seq., a statute antedating the FTCA, and similar in content to state workmen's compensation acts.[3] Section 16(c) of the FECA provides that this is its sole obligation.[4] The govern-

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[1] Rhode Island adopted an early version of the Uniform Contribution Among Joint Tortfeasors Act. R.I. Gen. Laws 10-6-1 et seq.

[2] While the word "tort" is in the title, the act itself waives the government's immunity to "claims . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government . . . ." 28 U.S.C. § 1346(b). In holding that the waiver was to be broadly construed and applied to contribution, the Court did not address itself to the question whether a claim for contribution by a joint tortfeasor is, strictly, a tort claim. Nor did it otherwise touch on the issues in the case at bar.

[3] The exclusivity provision with which we are presently concerned was not added until made necessary by the Federal Tort Claims Act. See S. Rep. No. 836, 81st Cong., 1st Sess., quoted by the Court in *Weyerhaeuser S.S. Co.* v. *United States*, *infra*, at 601, n. 5.

[4] "The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the in-

ment discharged this liability by paying the widow $8,600. Thereafter the widow sued appellee, and recovered $50,000 by way of settlement. As required by section 32 of the FECA,[5] the widow then repaid the $8,600 to the government. Appellee demanded contribution by the government to the extent of

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strumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel." 5 U.S.C. § 8116(c).

[5] "Adjustment after recovery from a third person. If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury. The amount refunded to the United States shall be credited to the Employees' Compensation Fund. If compensation has not been paid to the beneficiary, he shall credit the money or property on compensation payable to him by the United States for the same injury. However, the beneficiary is entitled to retain at least one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted, plus an amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States." 5 U.S.C. § 8132.

$8,600.[4] Citing section 16(c), the government refused. The parties having stipulated to the above facts, the court granted judgment for the appellee, 293 F. Supp. 809, and the government appeals.

Basically it is appellee's position that the limitation contained in section 16(c) has the purpose of restricting recovery by the employee and his representatives, and is not directed at rights of unrelated third parties. The issue is not that simple. The inquiry must be, what right is appellee seeking to enforce.

It is clear that if appellee's claim to reimbursement were a strictly independent right, personal to appellee, section 16(c) would not bar such recovery. *Weyerhaeuser S.S. Co.* v. *United States*, 1963, 372 U.S. 597. There a private shipowner, whose vessel collided with a government vessel, brought suit in admiralty. A cross libel was filed. Finding both to blame, the court divided the damages. The government, asserting that section 16(c) was a bar to its further liability, objected to the court's including in the gross damages the amount that Weyerhaeuser was required to pay a government employee injured in the collision. The Court rejected this contention, saying, at p. 601,

> "The purpose of § 7(b), added [to the FECA] in 1949, was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third

[4] Actually, the complaint as filed sought the entire $50,000. However, appellee did not appeal from the court's award of $8,600, and informs us that this is the proper figure.

parties, much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases."

Appellee cannot take all the comfort from *Weyerhaeuser* that it might wish. While the result there was to include in the damages to be divided between the parties what Weyerhaeuser had to pay the government employee, Weyerhaeuser had a direct right of action against the government because of the collision with its vessel. The Court held that section 16(c) of the FECA did not bar the inclusion of Weyerhaeuser's tort liability to the government employee as part of its consequential damages. The resultant division of damages was not contribution, but was in accordance with the admiralty rule of reduced recovery when there is contributory negligence.

The decision below is not supported by *Weyerhaeuser*, and is inconsistent therewith. The court awarded Weyerhaeuser one-half of what it was required to pay to the government employee, a sum substantially greater than the compensation payment under the FECA. *See* 294 F.2d 179. If the *Weyerhaeuser* principle applied to the case at bar, appellee should recover $25,000, not $8,600. Neither the court below, nor the cases upon which it relied, nor even appellee (*see* n. 6, *supra*) makes that contention.

While on the subject of consistency, we might add that the court's award of $8,600 is inconsistent with the basic concept of contribution, which is sharing, not payment in full. On appellee's theory, that the government's liability of $8,600 was occasioned by joint negligence, it would seem that the obligation should be divided between them. Instead, the government has been made to pay as much as if the negligence had been solely its own. The court's reasoning,

293 F. Supp. at 815, seemingly that the government should pay one-half of the $50,000, but that "limitless contribution would probably compel a complete reconsideration of the actuarial basis of compensation insurance," while supported by a dictum in *Elston* v. *Industrial Lift Truck Co., Inc.*, 1966, 420 Pa. 97, and in accord with the Pennsylvania rule, as there summarized, seems impermissible ad hoc legislation.[7] Either the government owes $4,300, or, conceivably, $25,000, or it owes nothing.

Although appellee mistakes the effect of *Weyerhaeuser*, the government places too much reliance upon *Pope & Talbot, Inc.* v. *Hawn*, 1953, 346 U.S. 406. There the combined negligence of a stevedore and a shipowner resulted in injury to an employee of the stevedore. In the Longshoremen's and Harbor Workers' Compensation Act there are exclusivity and recoupment provisions comparable to the pertinent sections of the FECA. The stevedore paid compensation under the Longshoremen's Act to the injured worker, who then sued the shipowner. The latter demanded that its accountability for damages to the worker be reduced by the amount of the stevedore's payment, and that the stevedore, because of its negligence, be forbidden to recoup from the employee—in effect what is being sought here. Otherwise, it argued, the stevedore would be profiting from its own lack of care. The Court refused, holding that the statutory scheme for workmen's compensation would be violated by such a result.[8]

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[7] The statement that such limited liability does not interfere with the statutory scheme we cannot accept. It interferes less than would unlimited liability, but, of necessity, it interferes *pro tanto*.

[8] The "specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third

The government fails to note the absence in *Pope & Talbot* of any statute providing for contribution. The shipowner sought to create rights merely from the fact that it was making a payment which benefited the negligent stevedore. This was a circular argument. If the shipowner had prevailed, in whole or in part, the stevedore would, in effect, have been indemnifying the shipowner for its own negligence, contrary to *Halcyon Lines* v. *Haenn Ship Corp.*, 1952, 342 U.S. 282. The circumstances that the shipowner's payment ultimately benefited the stevedore was *res inter alios*. The latter's payment to its employee had nothing to do with negligence, but was contractual indemnity.

An injured party's insurance does not redound to lessen the liability of the third party who caused the injury. Had the stevedore in *Pope & Talbot* been an ordinary insurer that had contracted with the employee, the shipowner would have received no benefit from, or credit on account of, the compensation payment. *Bangor & A. R. Co.* v. *Jones*, 1 Cir., 1929, 36 F.2d 886; *Parmiter* v. *United States*, D.Mass., 1948, 75 F.Supp. 823; Note, Unreason in the Law of Damages: The Collateral Source Rule, 77 Harv. L. Rev. 741 (1964); Rest. Torts § 920, Comment e. Correspondingly, the fact that the employee here had agreed with the government to make a refund in certain circumstances was none of the shipowner's concern.[9]

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person negligently causing such injuries . . . [are] to protect employers who are subjected to absolute liability by the Act." 346 U.S. *supra* at 412.

[9] Indeed, thinking of the government as wearing two hats, in its capacity as insurer it is reasonable rather than unreasonable to provide that it recovers from a negligent third party.

We must, accordingly, determine whether the right of contribution as between joint tortfeasors calls for a different result. We think not. We reach this result not by application of rubric—whether the government was a joint tortfeasor or not—because stating the question in such manner tends to assume the point, but by considering the nature of the right of contribution. Contribution does not create direct liability in tort, each towards the other, between two tortfeasors. Rather, as the word implies, it is a right based upon equitable fairness. The right to have the other tortfeasor contribute to his outlay arises in whichever tortfeasor satisfies the loss. It is inequitable that as between two parties jointly liable the ultimate loss should be fortuitously determined by the injured party's choice of defendant. Gregory, Contribution Among Joint Tortfeasors: A Defense, 54 Harv. L. Rev. 1170 (1941); Leflar, Contribution and Indemnity Between Tortfeasors, 81 U.Pa. L. Rev. 131, 137 (1932); Note, Toward a Workable Rule of Contribution in the Federal Courts, 65 Colum. L. Rev. 123, 125 n. 19 (1965).

As a matter of legal principle the route to contribution must be via subrogation or assignment based upon payment.[10] In such circumstances we would suppose that there would be nothing to be subrogated to if the other party, claimed to be a joint tortfeasor, was never under liability to the injured party. Nor do we readily see any unfairness, so far as the nonliable party is concerned, for he, by hypothesis, receives no benefit from the satisfaction of the other

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[10] Because this is an assignment by operation of law, 31 U.S.C. § 203 forbidding the assignment of claims against the government does not stand in the way. *Penn Tanker Co.* v. *United States*, 5 Cir., 1969, 409 F.2d 514.

actor's liability. Some courts, nevertheless, have found unfairness unless the immune party contributes, without, however, explaining where the unfairness lies. *See, e.g., Zarrella* v. *Miller*, 1966, 100 R.I. 545. With all due respect, compelling contribution here could be said to be a windfall. But if such decisions are sound they cannot affect the case at bar. In *Zarrella* the party required to contribute was a husband whose negligence, along with the negligence of the party seeking contribution, had injured his wife. Under state law the husband was immune from suit by the wife. The court held, nonetheless, that he was liable to contribute. Even if Rhode Island would extend this principle to override the workmen's compensation statute,[11] we would not be bound. The immunity being state-created, the state, through its courts, may properly determine its extent. In the case of the FECA the immunity is federally created; its extent must be determined by the federal courts, particularly when the issue is one of government liability.

Looking at the question as one of federal law, we hold that contribution cannot be had from the government when the government was under no tort liability to the injured party. Even when the person obliged to pay was only secondarily liable, and hence entitled to full indemnity, it has been held that no right arises

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[11] A distinction has been drawn. *Compare Smith* v. *Southern Farm Bureau Cas. Ins. Co.*, 1965, 247 La. 695, 174 So. 2d 122 with *Yale & Towne Mfg. Co.* v. *J. Ray McDermott Co.*, 5 Cir., 1965, 347 F.2d 370; *McLaughlin* v. *Braswell, La.*, 1968, 208 So.2d 535; *Sanderson* v. *Binnings Constr. Co., La.*, 1965, 172 So.2d 721. If abstract fairness is the test, in the workmen's compensation cases the employer, at least overall, does incur contractual liability, which is to be offset by immunity in the individual case. *Cf. Pope & Talbot* v. *Hawn, supra.*

against the primary actor if, as he employer, he was statutorily immune from tort liability. *United Air Lines, Inc.* v. *Wiener*, 9 Cir., 964, 335 F.2d 379; *Bertone* v. *Turco Products, Inc*, 3 Cir., 1958, 252 F.2d 726; *Slattery* v. *Marra Bro., Inc.*, 2 Cir., 1951, 186 F.2d 134, 139. These are a fortiori cases, as a duty might be thought to arise btween one primarily liable directly to the one only seondarily liable. *But cf. Slattery* v. *Marra Bros., In., supra*, where the court pointed out, in denying reovery, that the only legal relationship was that of jint tortfeasors, each to the injured party. We need ot go as far as those courts to hold that contribution s barred in the present case.

The judgment of the Distrit Court is vacated. Judgment for the defendant.

COFFIN, *Circuit Judge* (concurring). I concur in the court's conclusion and sharewhat seems to be its ultimate rationale. The purpe of this separate statement is to underscore thatrationale, which, in my view, is more strongly supprted by the relevant cases than the court's opinion rflects.

There are two elements in th Federal Employees' Compensation Act which togethr support denial of contribution to appellee: the imunity from suit by the injured party conferred on the government by section 8116(c); and the provisons establishing and protecting the Employees' Comensation Fund as a source for payment of the obligations stemming from the government's absolute liabili for benefits.

The significance of the first lement springs from the basic justification of contrbution. As Prosser succinctly states it,

> "There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free." Prosser, *Torts* (Hornbook Series, 3d ed. 1964), p. 275.

In the case where one of the tortfeasors is immune from suit by the injured party—our case—the rationale behind contribution no longer exists, for there is no possibility of the arbitrary, fortuitous, or collusive choice of defendants which underlies contribution. That the government may go "scot free" may be somewhat unfair, but the unfairness stems not from the law of contribution but from the fact that the government is given immunity under section 8116(c) in exchange for strict liability for specified benefits for all injuries of its covered employees.

Weyerhaeuser S.S. Co. v. *United States*, 372 U.S. 597 (1963), helps appellee not at all. The Court observed, at 601, that "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties" in passing section 8116(c). This observation has no bearing here because, as noted above, immunity from contribution arises from tort immunity *not* by legislative intent but because the underlying justification for contribution no longer exists when one tortfeasor is immune from suit by the injured party. Even were appellee to have had a direct cause of action in tort against the government, it could not rely on *Weyerhaeuser* to recover for its payments to the injured government employee. *Weyerhaeuser* was, as the whole opinion and sequence from

grant of certiorari to holding indicate, strictly the product of a unique admiralty doctrine in which payments to victims are included in defining damages to be shared.* The Court there found no intent to disrupt the age-old doctrine of divided damages in admiralty cases; I find no intent to alter the traditional rule that tort immunity yields contribution immunity. *See* Prosser, *supra* at 277; 19 ALR 2d 1003; 26 ALR 3d 1283.

The second element in this case is the linkage of a compensation scheme based on absolute liability with a fund which is protected in part by a recoupment provision when employees are injured by others, section 8132. Its significance for our case, it seems to me, was settled by *Pope & Talbot* v. *Hawn*, 346 U.S. 406, 411-412 (1953), in which the Court held, as to a similar scheme, that preventing the employer from recouping benefits paid would frustrate the purpose of the statute. Surely that same frustration occurs here if appellee can defeat recoupment. That there was no right of contribution in *Pope & Talbot* did not weigh heavily on the Court's mind and does not seem to me to detract at all from the authority of the case as applied to our situation. I concede that it might not be conclusive if appellee's right were of a more

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* For this reason I see no useful purpose in speculating what appellee's recovery would have been if appellee had a direct cause of action. It would have recovered its damages—but without inclusion of any amount paid to the employee. Moreover, the court's reference to $4,300 seems to imply that in contribution each party is obligated to pay half of what it would have had to pay had it been the lone tortfeasor. That logic would mean that the injured party in this case only gets $29,300 instead of the $50,000, i.e., $25,000 from Newport (half what it would have paid) and $4,300 from the government (half what it would have paid).

compelling nature. *Compare Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969) with *United Air Lines* v. *Wiener*, 335 F.2d 379 (9th Cir. 1964), *cert. denied*, 379 U.S. 951 (1964).

The presence of this statutory fund and scheme is also an adequate basis for distinguishing *Zarella* v. *Miller*, 100 R.I. 545 (1966), which gives the court so much concern. The Rhode Island court was willing to subject a husband, who could not be sued by his wife, to liability for contribution to a joint tortfeasor. It thus applied contribution where the traditional justification—the possibility of a captious choice of defendant—was lacking; but, as the court there points out, with the marital relationship removed from the case by a change in party plaintiff, there was no reason for recognizing the interspousal immunity. This reasoning does not apply to allow contribution from an employer subject to a workmen's compensation system. A change of party plaintiff from injured victim to liable tortfeasor would not remove the fact that the legislative purpose would be frustrated if third parties could defeat the recoupment provision. *Pope & Talbot* v. *Hawn, supra.*

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